United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

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~~75-1026~~

To be argued by
HENRY J. BOITEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1026

UNITED STATES OF AMERICA,
Appellee,

—vs.—

ELPIDIO MORALES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF AND APPENDIX

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PAGINATION AS IN ORIGINAL COPY

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-1026

UNITED STATES OF AMERICA

Appellee

v.

ELPIDIO MORALES

Defendant-Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 9th day of April, 1975, deponent served the within Brief and Appendix upon U.S. Attorney For the Southern District of New York One St Andrews Plaza, New York, New York.

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 9th day of April 1975

Harold Silberzweig

HAROLD SILBERZWEIG
Notary Public State of New York
No. 30-[illegible]995450
Qualified in Nassau County
Commission Expires March 30, 19[illegible]76

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1026

UNITED STATES OF AMERICA,

-vs.-

ELPIDIO MORALES,

Defendant-Appellant.

APPELLANT'S BRIEF AND APPENDIX

Questions Presented for Review

1. The defendant had previously been convicted of a similar crime. The defense moved for an Order precluding the prosecutor from impeaching the defendant by reference to that crime. The Trial Court ruled that, if the defendant testified, the prosecutor would be permitted to use the prior crime for impeachment purposes. In doing so, did the Trial Court both apply the wrong standard and reach the wrong result?

2. When the jury reported that it could

not reach a verdict since it was "hopelessly deadlocked", was it error for the Trial Court to charge the jury that it had not given the case "sufficient attention" and that "the matters involved here...are not of any essential difficulty to resolve"?

Preliminary Statement

Elpidio Morales appeals from a judgment of conviction entered against him on January 28, 1975, after a jury trial before the Honorable Milton Pollack, in the United States District Court for the Southern District of New York.

A three count indictment charged the defendant with: (1) conspiracy to distribute a quantity of cocaine hydrochloride (21 U.S.C. § 846); distribution of .3 grams of cocaine hydrochloride on October 2, 1974 (21 U.S.C. §§ 812, 841[a][1] and 841[b][1][A] and 18 U.S.C. § 2); and distribution of 117.41 grams of cocaine hydrochloride on October 3, 1974. The indictment named two additional defendants, Milagros Gerena and Gricel Segui, both of whom entered pleas of guilty and testified as government witnesses at the defendant's trial. The jury returned a verdict of guilty as to the defendant with regard to each of the three counts.

On January 28, 1975, the defendant was sentenced to a term of eight years imprisonment, to be followed by three years of special parole. The

sentence was imposed as to each of the three counts, to be served concurrently and to run concurrently with a sentence of five years imprisonment and three years of special parole previously imposed upon the defendant with regard to a distinct judgment of conviction entered against him in the United States District Court for the Eastern District of New York.

Statement of Facts

No issue is raised on this appeal with regard to the sufficiency of the evidence. Two alleged accomplices, Milagros (Millie) Gerena and Gricel (Grace) Segui testified as government witnesses and alleged that the defendant had been the source of cocaine hydrochloride which they sold to undercover agents of the Federal Drug Enforcement Administration (DEA). (Tr. 126, 164).* It was stipulated at trial that, if an expert witness were called, he would testify that the substance sold by these women was, in fact, cocaine hydrochloride in the quantities charged in the indictment (Government's Exhibit 6; Tr. 160). The only factual issue at trial was the credibility of these two witnesses with regard to their identification of the defendant. No witnesses testified in behalf of the defense.

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* "Tr." references are to the trial transcript; "A." references are to Appellant's Appendix, annexed hereto.

Milagros Gerena is a twenty-six year old female of Puerto Rican origin. She has lived in New York City since she was four years old. Since the age of eighteen she has, on quite a number of occasions, trafficked in hard narcotic drugs, either as a courier or a seller. She has also used cocaine and heroin; indeed, on the day she was released following her arrest in the instant case, she injected heroin into her veins (Tr. 137-8, 140-7).

During the eighteen month period commencing in September, 1973, and ending a few weeks prior to the instant trial, Gerena was employed as a "masseuse" at a massage parlor called Relaxation Plus [hereinafter "Relaxation"]. She worked between two and four days a week, eight hours per day. Relaxation paid her one dollar eighty-five cents ($1.85) per hour for her labors. With tips, she earned approximately three hundred dollars ($300.00) per week. (Tr. 138-9).

On August 1, 1974, Michael (Mike) Horn, a Special Agent of the DEA, working in an undercover capacity, met Gerena at Relaxation. He indicated to her that he was interested in obtaining cocaine. (Tr. 89, 97, 124-5). She replied that she had a source for cocaine, that her suppliers were Cubans, and that they dealt in a minimum quantity of one-eighth of a kilo. She said that she would get back in touch with him when she was ready to consummate a sale (Tr. 89,

98-101).

On September 13, 1974, by telephone, it was agreed that Gerena and Agent Horn would meet at a Holiday Inn in Manhattan. Later that day the meeting was cancelled by Gerena. (Tr. 89).

On September 23, 1974, in another telephone conversation, Gerena assured Agent Horn that her suppliers would not have any difficulty providing the narcotics, but that it might take a few more days (Tr. 90).

On October 2, 1974, Gerena contacted Agent Horn by telephone and told him that she had a "very superior" shipment of cocaine available to her, and it was agreed that they would meet at the Holiday Inn that afternoon. At 3:15 p.m., Agent Horn, accompanied by Agent Frederick Marano, met Gerena at a snack bar in the Holiday Inn. She gave him a sample ("taste") of the cocaine, wrapped in a dollar bill, in order to demonstrate the quality of the drug. The sample and the dollar bill were preserved and placed in evidence at trial. During the course of the meeting, a stalemate developed due to Gerena's claim that her source of supply wanted to be paid "up front" before the delivery of the cocaine. Agent Horn refused such an arrangement, and she agreed to ask her source to re-consider that requirement (Tr. 90-3, 111-112).

Later that day, Gerena called Agent Horn

and advised him that her source had agreed to give her the cocaine as long as the transaction was completed at the apartment of her manager, Alvin Sigalo, 33 East 55th Street (Tr. 93-4, 113).

At 2:45 p.m. on the following day, October 3, 1974, in another telephone conversation, Agent Horn and Gerena agreed that the transaction would be consummated at the apartment at 10:15 p.m. that evening (Tr. 94).

At 10:00 p.m., Agents Horn, Marano, and Andrew Smith, entered the apartment. Smith hid in a bedroom, while the undercover agents waited for Gerena in the living room. Shortly thereafter, she arrived, accompanied by Grisel Segui. This was Segui's first appearance in the plot. As Segui counted the money produced by Agent Marano, Gerena removed the package of cocaine from her pocketbook. At that point, Agent Smith came out of the bedroom and the two girls were arrested (Tr. 95, 114).

The girls were brought to DEA headquarters in Manhattan. Gerena was the first to break. She claimed that the source of the narcotics was one Bigue Gonzalez who, she said, was Segui's common-law husband, and resided with Segui at 1120 Wyatt Street in the Bronx. She further claimed that she had known "Bigue" for three years and had met him on many occasions during that period. ([Hearing]Tr. 7-8, 46-8, 55-60, 65; [Trial] Tr. 136).

Segui was questioned separately. After being told by the agents that the source was Bigue Gonzalez, she agreed. She said she had been living with Bigue for the past eight months at the Wyatt Street address (Tr. 167, 177-8).*

On November 4, 1974, Agents Marano and Smith were observing a luncheonette at 174th Street and Walton Avenue in the Bronx, and the defendant was seen to enter the establishment. As he exited shortly thereafter, he was arrested. The defendant denied knowing either Gerena or Segui. In response to further questioning by the agents, he revealed that his mother's maiden name was Gonzalez (Tr. 117-118, 121).

At trial, Gerena testified that the events of this case constituted the only occasion on which she had acted as a courier for Bigue (A. 144), and that others had been the source of narcotics in her prior sales

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* As revealed at a pre-trial identification hearing (Tr. 6, et. seq.), but not at the trial, Gerena gave a description of Bigue to the agents (Tr. 8). The description was, admittedly, sketchy, and not of the type that would prompt recognition (Tr. 19). It included the claim that Bigue was from the Dominican Republic, and that he was a fugitive with regard to a prior federal narcotics arrest in New York City. She also advised that a co-defendant in the prior case was a man known to her as "Leo". A check of fugitive files revealed an individual by the name of Juan Gonzalez a/k/a Jose Leonardo. Leonardo's picture was shown to Gerena, and she identified it as being that of "Leo". Leonardo's co-defendant in the case had been the defendant herein, Elpidio Morales. Morales' picture was also shown to Gerena, and she identified it as being that of "Bigue". (Tr. 8-12, 20, 47 et.seq.).

(Tr.140-143). She categorically denied that she had ever told Agent Horn that Cubans were her source of supply (Tr.147). Agent Horn, on the other hand, categorically affirmed that she had made such a claim, as noted in his report of his interview with her of August 1, 1974. (Tr.98-9). He also claimed that, a day or so before the arrest of the girls, Gerena had indicated that her source of supply had changed. No notation to that effect appears in his reports or notes or in the tape recordings of his telephone conversations with Gerena (Tr.99-106).

Both Gerena and Segui, whom the government advanced as truthful witnesses (Tr. 214-16), denied that they ever knew the defendant under the name Elpidio Morales. Segui, who knew him a year, and lived with him for eight months, testified that she only knew him under the name of Bigue Gonzalez (Tr. 164, 167). Gerena testified likewise, but also claimed that she had heard him called "Eddie" (Tr. 126, 136). In summation, the government sought to make much of the fact that the defendant's mother's maiden name was Gonzalez, although it conceded the name to be a common one (Tr. 219).

On cross-examination, Segui testified that there were certain markings on the defendant's body (Tr. 170-175), but that claim was not verified at trial.

Also, on cross-examination, Segui claimed that when she returned to her apartment following her arrest "Bigue" was gone but various of his clothing remained in the apartment. A few days later, at his telephoned request, she gave his clothing to him. (Tr. 176-8).

The government never searched the apartment for fingerprints or for other evidence in order to establish the identity of Bigue. Similarly, the sample and the bulk package of cocaine, both of which had been handled by Bigue and carefully preserved by Gerena, were not examined for fingerprints. No effort was made to surveill Gerena or Segui during or after the transaction. (Tr. 106-8, 119-20, 181). Finally, no effort was made at trial to corroborate the claim that Segui lived with Morales or that Morales was the same man as Bigue or that Morales had ever been seen in the company of either of the women.

Argument

POINT I

THE TRIAL COURT APPLIED THE WRONG STANDARD, ABUSED ITS DISCRETION AND DEPRIVED THE DEFENDANT OF A FAIR TRIAL IN DENYING A DEFENSE MOTION FOR AN ORDER PRECLUDING THE GOVERNMENT FROM IMPEACHING THE DEFENDANT WITH REGARD TO A PRIOR CONVICTION IF THE DEFENDANT WERE TO TESTIFY IN HIS OWN BEHALF.

On August 3, 1972, the defendant was indicted

in the Eastern District of New York on four counts charging him with the possession and distribution of cocaine hydrochloride in July, 1972. He thereafter entered a plea of guilty to one of the counts, and was released on bail pending sentence. He did not appear on the date scheduled for sentence and was declared a fugitive. He was subsequently arrested in the present case. On November 13, 1974, he was sentenced with regard to the Eastern District plea. Copies of the Eastern District indictment and judgment and commitment are reproduced at A. 71-3 and were marked as Court's Exhibits 1 and 2 respectively, at trial (Tr. 189). None of these facts were ever revealed to the trial jury herein.

Following the completion of the government's case, the defense moved the Court for an Order precluding the government from eliciting the prior conviction if the defendant should testify in his own behalf (A. 7). After examining the Eastern District indictment and judgment, the Court responded:

> "I see no reason why this defendant should not be cross-examined on a crime of the same character committed at a reasonably nearby date to the alleged commission of the crime on trial." (A. 8).

Defense counsel replied:

> "I believe that Your Honor has concisely, in effect, stated the very reasons why that prior conviction should not be used against him. The

danger in these things is that the jury will believe that if the defendant was guilty of one crime, then he probably was guilty of the other because of the similarity of the offenses and because of the closeness in time. That is the very reason why such evidence is excluded when it is excluded." (A. 9)

Citing various authorities to the Court, defense counsel reiterated the above noted exclusionary rationale, and noted:

"Now, if the prior crime was really part of the same conspiracy, which is not the case here, we might have something other to argue about. But there is no contention that this is part of any similar or continuing conspiracy. The ladies who testified here both indicated that this was the first time they had engaged in such conduct with Bigue Gonzalez." (A. 10)

The Court then held that the newly adopted Federal Rules of Evidence were applicable to the present case, and that Rule 803 (22) was applicable to the present case (A. 10). That Rule provides as follows:

"Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

"Judgment of previous conviction - Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but

not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

The Trial Court then ruled:

"Should the witness take the stand, I would conceive that for the purpose of impeachment under the rules of evidence as they pre-exist to this Act that I have called attention to and under the Act itself, the inquiry would be appropriate." (A. 11)

Defense counsel took exception to the Court's ruling and argued "That Your Honor's interpretation, both of the rule and of the case law on the subject, fails to take into account the balancing factor which, as a matter of due process, ought to be applied in every case." (A. 12). The Court replied:

"I have taken into consideration the balancing factor, and in view of the circumstances revealed by this record and the line of defense that has been asserted here, the credibility of this defendant, if he takes the stand, is very much a question for the jury.

"This defendant, according to the evidence and the record so far, the defendant, when questioned by the government officers at the time of his arrest, made a denial of acquaintanceship or knowledge of the two female witnesses who have appeared here, and on the basis of the testimony that has been adduced on this record, the issue of credibility is a very vital one on that subject."(A. 12-13)

The defendant did not testify in his own behalf.

In fact, the Trial Court erred in two respects with regard to the Federal Rules of Evidence. In fact, those rules had not yet taken effect since, under the provisions of P.L. 93-595, 93rd Congress, H.R. 5463, the Rules will not take effect until July 1, 1975. In any event, having applied the Rules, it is respectfully submitted that the District Court was bound to apply them correctly.

Rule 404 (b) provides as follows:

> "Character evidence not admissible to prove conduct; exceptions; other crimes.
>
> " * * *
>
> " (b) Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Rule 609 provides, in pertinent part, as follows:

> "Impeachment by evidence of conviction of crime.
>
> "(a) General rule. - For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the Court determines that the probative value of admitting this evidence outweighs its prejudicial

effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

* * * "

[emphasis added]

It is clear from the colloquy at trial that, in making its determination, the Trial Court overlooked Rules 404 and 609. It is true that, when faced with counsel's persistent reference to the "balancing factor" the Court, in an off-handed, pro forma fashion indicated that it had taken that factor into consideration (A. 12). However, the improperly prejudicial affect which would have befallen the defendant if such impeachment evidence had been presented to the jury is no better demonstrated than by the attitude of the Court, itself, toward the significance of such evidence. The Court's immediate reaction, as shown by its statement quoted supra, p. , was that the prior conviction was admissible since it involved "a crime of the same character committed at a reasonably nearby date to the alleged commission of the crime on trial." (A. 8)

Even more telling was the Court's statement to the jury following the return of the verdict herein:

"While it is not of any relevancy to your deliberations on the case that you did have, you will be interested to know that Mr. Elpidio Morales pleaded guilty on November 13, 1974 to cocaine conspiracy in which he engaged in July of 1972, so that one month after the transactions that this jury deliberated on, one month before,

> that is, in October, he had the transactions on which you, the jury, functioned and have now reported as having been had by him, and one month later he pleaded guilty to having done the same thing in the Eastern District of New York two years earlier for which he was sentence to five years in prison." *

In effect, the Judge was telling the jury that they should rest easy with their verdict since the plea of guilty to the prior crime indicated guilt as to the crime on trial.

If the Trial Judge, himself, so easily fell into error as to the limited relevancy of such impeachment evidence, it must certainly be concluded that the jury would have reached the same conclusion if such evidence had been revealed to them during the cross-examination of the defendant.

As is abundantly clear, the decisive issue in this case was the credibility of the two alleged accomplices who had testified as government witnesses. The only person who could have rebutted their testimony was the defendant. The weaknesses of their testimony, and the failure of the government to produce any significant corroborative evidence or to even follow through

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* The dates indicated by the Court are in error, but the error is immaterial to the point which we wish to make.

on normal investigative techniques, could well have swung the balance of reasonable doubt in the defendant's favor if he had testified. In view of the Trial Court's erroneous ruling, the defendant, understandably, declined to testify. He was thus deprived of his only possible line of defense.

It is respectfully urged that a reversal of the judgment of conviction is mandated not only by the Federal Rules of Evidence, but also by the prior holdings of this and other Courts: United States v. Puco, 453 F. 2d 539 (2d Cir., 1971); United States v. Palumbo, 401 F. 2d 270 (2d Cir., 1968), cert. denied, 394 U.S. 947; Gordon v. United States, 383 F. 2d 936 (D.C. Cir., 1967); Luck v. United States, 348 F. 2d 763 (D.C. Cir., 1965); People v. Sandoval, 34 N.Y. 2d 371, 357 N.Y.S. 2d 849 (1974).

POINT II

THE TRIAL COURT'S COMMENTS TO THE JURY WHEN IT REPORTED A "HOPELESS DEADLOCK" DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

After the prosecution and the defense had rested, but immediately before the Court's charge, the jury demonstrated its effort to give proper consideration to the evidence by requesting that the testimony of the last government witness, Gricel Segui (who had lived with the culprit for eight months), be re-read to them.

It was. (Tr. 197).

The case went to the jury at 12: 50 p.m. on January 15, 1975. (A. 46). At 2:45 p.m. of that day, at the request of the jury, portions of the Court's charge, with respect to each count of the indictment, were re-read to the jury, and the Court, additionally, gave a supplementary charge (A. 48).

At 5:10 p.m. of that day, the jury sent a note to the Court which read as follows:

> "I am sorry to report that we, the jury, is [sic] hopelessly deadlocked and cannot reach a unanimous decision." (A. 52).*

The Court thereupon advised the jury as follows:

> "The case has hardly received the sufficient attention that it deserves, nor is it a case that would seem to be beyond the capacity of intelligent, reasonable-minded jurors to grasp and consider and decide.
>
> "So, I am going to suspend your deliberations now for the afternoon and ask you to return tomorrow morning at 9:30 to continue your deliberations in the endeavor to conclude this case.
>
> "If there is any difficulty arising due to any matter of recollection, there will be no difficulty in having parts of the charge re-read to you or parts of the evidence re-read to you. But it has

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* The transcript does not indicate that counsel were advised of the contents of this note prior to the time that the Court read its contents in open court in the presence of the jury. In fact, counsel did not have any knowledge of the contents of the note.

> been an extremely short trial, and while the charge may have been a little lengthy, giving you the legal instructions, I hope they were clear. It was a short trial, and the matters involved here which are not of any essential difficulty to resolve, an effort should be made to see if the jury can agree on all or any one of the charges that are involved here." (A. 52-3).

The Court thereupon released the jury for the day (A. 53). An examination of the transcript (A. 52-3) reveals that the Court's instruction to the jury and the declaration of an adjournment of the day's proceedings were part of one continuous statement.

As the jury left the courtroom, defense counsel requested the opportunity to address the Court, and the Court instructed that the jury be held in the jury room (A. 53-4). Defense counsel then addressed the Court as follows:

> "I would like to take respectful exception to Your Honor's statement to the jury that the subject matter of this case - I am only paraphrasing - is not complex and should not be difficult to resolve for reasonable minds, or words to that effect.
>
> "It seems to me that the jury here is confronted with one of the most difficult decisions and that is weighing that intangible thing called credibility, and that is always difficult to resolve.
>
> "I don't think that it should be in any way minimized to the jury, nor should it be suggested that they are not in any way fulfilling their function in finding such a problem difficult to resolve. Upon that basis, I move for a mistrial."(A. 54)

The Court forcefully rejected defense counsel's complaint, and instructed the clerk to excuse the jurors for the day.

Deliberations resumed at or about 9:45 a.m. on the following day, and the jury returned its verdict at or about 2:45 p.m. of that day. (A. 56)

It is respectfully submitted that, in its remarks to the jury, the Trial Court improperly belittled the jury's prior efforts to reach agreement, and denigrated the only line of defense available to the defendant - the credibility of the prosecution witnesses. The Court effectively told the jurors that, if they could not "decide" the matter, then they were not "intelligent, reasonable-minded jurors", and additionally advised them that the central issue in the case was "not of any essential difficulty to resolve." The fact that the trial had been "extremely short" was twice stated to the jurors. It is difficult to understand how the resolution of an issue of credibility is in any way simplified by the length of the trial. It is to be noted that, at no point did the Trial Judge, during the course of his lecture to the jurors, remind them of their duty to retain their individual conclusions as to the evidence, unless pursuaded otherwise, nor did he remind them of their individual duty to vote for acquittal unless pursuaded of the defendant's guilt beyond a reasonable doubt.

As was stated in United States v. Thomas, 449 F. 2d (D.C. Cir., 1971) [en banc]:

> "Improper duress upon a deadlocked jury does not seek its only source in threats of physical abuse. Communications from judge to jury are unduly constraining whenever they possess a substantial propensity for prying individual jurors loose from beliefs they honestly have. The jury is coerced, the Supreme Court has held, when it is told that '[y]ou have got to reach a decision in this case,' and in much the same category is the admonition in this case that 'you ought to be able to agree on a verdict.' Statements of this sort reflect the judge's assessment that the factual issues bear relatively easy resolution, and pressure jurors, who in their own endeavors have not found it so, to come to a result at all costs.
>
> "So also, in somewhat similar fashion, do expressions emphasizing the desirability of achieving a verdict as a means of avoiding the necessity of a re-trial. Equally pressuring are statements succeptible to an interpretation reflecting unwholesomely upon minority jurors simply because they happen to be in the minority. 'No juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence, or his integrity.' (449 F. 2d at 1183).

Similarly, in United States v. Rogers, 289 F. 2d 433 (4th Cir., 1961), the Court stated:

> "We have thus indicated that the permissibility of a direction to jurors to re-examine their views in the light of those of their fellows is dependent upon the moderating reminder of their own individual responsibility and the necessity that any verdict be that of

each of the jurors and not just that of a majority. When the moderating condition which makes the direction to re-examine their views permissible, and desirable in many cases, is ommitted, then the direction becomes so likely to be coercive, that a verdict rendered promptly thereafter should not be allowed to stand." 289 F. 2d at 437.

See also: United States v. Fioravanti, 412 F. 2d 407, 414-420 (3rd Cir., 1969), cert. denied, 396 U.S. 837 (1969).

We respectfully urge that, within the context of the present case, the Court's lecture to the jury clearly violated the principles enunciated in the above noted cases, and requires a reversal of the defendant's conviction.

Conclusion

For all of the above reasons, the judgment of conviction should be reversed and the defendant should be granted a new trial.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Defendant-Appellant
Elpidio Morales

Dated: New York, New York
April 9, 1975

APPELLANT'S APPENDIX

INDEX

C. Form No. 106

CRIMINAL DOCKET

JUDGE POLLACK 74 CRIM. 1075

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Jeremy G. Epstein, AUSA.
1. ELPIDIO MORALES, a/k/a Bigue Gonzalez"-1-3	791-1937
2. MILAGROS GERENA-1-3	
3. GRICEL SEGUI-1&3	For Defendant:
	(2) Franklyn Gould
	401 B'way NYC 966-6[illegible]

ABSTRACT OF COSTS	AMOUNT
(07)	
Fine,	
Clerk,	
Marshal,	
Attorney,	
Commissioner's Court,	
Witnesses,	
21:846 Consp. to viol. Fed. Narco. Laws.(Ct.1)	
21:812,841(a)(1),(b). Distr. & possess. w/intent to distr. Cocaine,II.(Ct.2&3)	
(Three Counts)	

CASH RECEIVED AND DISBURSED

DATE	NAME	RECEIVED	DISBURSED

UNITED STATES COURT OF APPEALS FILED FEB [illegible] 1975 J. DANIEL FUSARO, CLERK SECOND CIRCUIT

DATE	PROCEEDINGS
11-14-74	Filed indictment.
11-21-74	ELPIDIO MORALES - Filed writ of H/C ad prosequendum issued and returnable 11-21-74.
11-21-74	Marked off. Tyler,J.
11-22-74	ELPIDIO MORALES - Filed writ of H/C ad prosequendum issued and returnable 11-25-74.
11-25-74	Dett's Gerena and Segui appear (Atty. present) plead not guilty, 10 days for motions. Both dett's released on their own recognizance. Tyler. Case assigned to Pollack,J. for all purposes.
12/4/74	Milagross Gerena- filed notice of appearance by atty. F. Gould.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
11/21/74	Filed affdvt for writ of habeas corpus ad pros. for Elpidio Morales issued writ ret. 11/21/74.		
11/25/74	Filed writ. of habeas corpus ad pros. for Elpidio Morales. 11/21/74 returned unexecuted. deft. located at USP Lewisberg Pa.		
1/10/75	Deft. Gricel Segui (atty. Brendlin Could present) now pleads guilty to count 1 only. Counts 2 and 3 are carried until date of sentence. Pre-sentence report ordered. For sentence 2/24/75 at 10 A.M. Deft. released on own recognizance. Pollack,J.		
1/13/75	Deft. Gricel Segui (atty. present) before Judge Pollack jury trial begun. Deft. withdraws her plea of not guilty as to count 3 only. Counts 1 and 2 are carried until date of sentence. Pre-sentence report ordered. For sentence 2/26/75 at 10 AM, Room 906. Deft. released on own recognizance. Pollack,J.		
1/14/75	Deft. Elpidio Morales (produced on a writ) (atty. present) (with interpreter Miss Frances Perez, present) The court directs entry of a plea of not guilty. Jury trial begun before. Judge Pollack.		
1/15/75	Trial cont'd.		
1/16/75	Trial cont'd. & concluded. Deft. found guilty as charged on each of counts 1,2 & 3. Pre-sentence report in the Eastern Dist. of New York, is to be brought up to date by the Probation Officer in this District. Sentence date left open. Writ not endorsed. Pollack,J.		
1/28/75	ELPIDIO MORALES (atty.present) Filed JUDGMENT - deft. is committed to custody of the Atty. Gen'l, for imprisonment for a period of E (8) YEARS on each of counts1,2 and 3 to run CONCURRENTLY with other. Pursuant to the provisions of T. 21,U.S. Code, Sec. 84 deft. is placed on Special Parole for a period of THREE (3) Y on each of counts 1,2, and 3 to run CONCURRENTLY with each ot to commence upon expiration of confinement. This sentence is		

 -cont'd. on next page-

Docket Continuation

DATE	PROCEEDINGS	Date Order or Judgment Entered
	(Judgment of 1/28/75 E. Morales cont'd.) CONCURRENTLY with the sentence imposed on 11/13/74 by the Hon. Edward R. Neaher in the U.S.D.C. E.D.N.Y. on indictment 72 Cr. 932. Pollack,J. issued all copies.	
1/28/75	E. Morales- filed notice of appeal from judgment docketed this date. Mailed notices. Leave to file in forma pauperis is granted.	Pollack,J.
1/28/75	E. Morales- filed CJA form 23 Financial Affdvt.	
2/13/75	Filed Judgment & Commitment	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [illegible] Deputy Clerk

USA-33s-510 - IND./INF. (Conspiracy to distribute and possess with intent to distribute narcotic drug.)
Rev. 5-27-72

[redacted]
74-3134

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

-v- :

[redacted] :

74 Cr. :

[redacted], a/k/a "Bigue Gonzalez,": today
[redacted], and N.G.
[redacted], :

Defendant . :

- -x

The Grand Jury charges:

1. From on or about the 1st day of March, 1974, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, [redacted], a/k/a "Bigue Gonzalez," [redacted], and [redacted],

the defendant and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

JGE:emw
74-3134

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

1. On or about October 2, 1974, MILAGROS GERENA entered the Holiday Inn, 440 West 57th Street, New York, New York.

2. On or about October 3, 1974, MILAGROS GERENA entered an apartment located at 1120 Wyatt Street, Bronx, New York.

3. On or about October 3, 1974, in an apartment located at 1120 Wyatt Street, Bronx, New York, ELPIDIO MORALES, a/k/a "Bigue Gonzales" handed a package to MILAGROS GERENA.

4. On or about October 3, 1974, MILAGROS GERENA and GRICEL SHOUI entered an apartment located at 333 East 55th Street, New York, New York.

(Title 21, United States Code, Section 846.)

USA-33s- 522 - IND/INF - Distrib. Possess Narc. Drug (Succeeding Count)
Rev. 5-2/-72

[redacted] COUNT

[redacted]

On or about the [redacted] day of [redacted],

in the Southern District of New York,

[redacted]

the defendant[redacted], unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, [redacted].

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).) [redacted]

USA-33s- 522 - IND/INF - Distrib. Possess Narc. Drug (Succeeding Count)
Rev. 5-27-72

[redacted]

[redacted] COUNT

[redacted]

On or about the [redacted] day of [redacted],

in the Southern District of New York,

[redacted],

the defendant [redacted], unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule [redacted] narcotic drug controlled substance, to wit,

[redacted].

2-4

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).) [redacted]

[redacted]

[redacted]

THE COURT: All right.

MR. BOITEL: Would it be permissible -- may I go off the record?

THE COURT: Off the record.

(Discussion held off the record.)

(Recess.)

(In open court in the absence of the jury.)

MR. BOITEL: Your Honor, I am in the middle, again, of advising my client concerning his rights under the circumstances with regard to testifying and presenting a case and I have reached that point where the question, if he takes the stand, whether he may or may not be cross examined or it may or may not be brought out before the jury the fact that he has a prior cocaine conviction.

I would move this Court that under the authority of such cases as Luk, et cetera, for a ruling as to whether the prosecutor may, in cross examination, bring out the defendant's prior convictior.

THE COURT: Why not?

MR. BOITEL: Pardon me?

THE COURT: Why not?

MR. BOITEL: I think within the context of this case it would be terribly prejudicial at this point --

THE COURT: What does that mean?

MR. BOITEL: I think it would be unfairly prejudicial.

THE COURT: You mean the fact that he is a felon would not be of assistance to him in the case? Is that what you mean by prejudicial? Or do you mean erroneously prejudicial?

MR. BOITEL: Unfairly prejudicial, I think I said. It would be unfairly prejudicial --

THE COURT: When was the prior conviction?

MR. EPSTEIN: He pleaded guilty in 1972, jumped bail and was sentenced in 1974.

THE COURT: He pleaded guilty to a conspiracy charge?

MR. EPSTEIN: Conspiracy to sell cocaine.

I have a copy of the indictment if your Honor wants to see it.

THE COURT: All right. Let's see.

MR. EPSTEIN: This is the judgment of conviction and the indictment. He pleaded guilty to Count 4.

THE COURT: I see no reason why this defendant should not be cross examined on a crime of the same character committed at a reasonably nearby date to the alleged commission of the crime on trial.

MR. BOITEL: I believe that your Honor has concisely, in effect, stated the very reasons why that prior conviction should not be used against him. The danger in these things is that the jury will believe that if the defendant was guilty of one crime, then he probably was guilty of the other because of the similarity of the offenses and because of the closeness in time.

That is the very reason why such evidence is excluded when it is excluded.

THE COURT: What case ever excluded such evidence? Give me one authority.

MR. EPSTEIN: Your Honor, if I can cite the second --

THE COURT: Just a minute. Mr. Boitel is an experienced appellate and trial lawyer, and I don't know whether he is putting me on at the moment or not, but if he has a point, I want to hear it.

MR. BOITEL: I have in mind the Luk case and other cases that have followed it. I have in mind the recent case in the New York Court of Appeals, for example -- again, we are talking about prejudice, we are not talking about any statutory prohibition, so I think the precedent is worth citing -- the recent case of People against Sandoval decided about five or six months ago, in which the philosophy of impeachment

evidence used with regard to the credibility of a defendant is really that.

You know, if it was just that he was convicted of a felony that went to his credibility, that would be one issue and perhaps it would be admissible for that purpose. But when the danger is that the jury will jump the gap and say, "Well, he committed a similar sort of a crime, so he probably committed this crime," well, then, the evidence is not admissible for that purpose. At least, that is my understanding.

Now, if the prior crime was really part of the same conspiracy, which is not the case here, we might have something other to argue about. But there is no contention that this is part of any similar of continuing conspiracy.

The ladies who testified here both indicated that this was the first time they had engaged in such conduct with Bigue Gonzalez.

THE COURT: According to the latest rules of evidence adopted on January 2nd, 1975, Public Law 93-595, signed by the President, according to the press this morning, the new rules of evidence apply to actions, cases or proceedings then pending, which I take it refers to this case, and Rule 803(22) reads:

"The following are not excluded by the hearsay rule,

even though the declarant is available as a witness.

"Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendre) adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissible."

Should the witness take the stand, I would conceive that for the purposes of impeachment under the rules of evidence as they pre-existed this act that I have called attention to and under the act itself, the inquiry would be appropriate.

MR. BOITEL: I respectfully --

THE COURT: I rule that on the basis of the submission to the Court of the indictment in 72 Criminal 932, United States District Court for the Eastern District of New York, in which Count 1 --

MR. EPSTEIN: It was Count 4 to which he pleaded.

MR. BOITEL: I have a copy of the judgment here.

THE COURT: Count 4 charged the defendant with the accusation that on or about July 26, 1972, the defendant,

Elpidio Morales and another named there, did knowingly and intentionally conspire to commit offenses against the United States in violation of Section 841(a)1, Title 21, United States Code, by unlawfully, knowingly and intentionally possessing with intent to distribute quantities of cocaine hydrochloride, a Schedule II narcotic drug-controlled substance.

Furthermore, by a judgment entered in the United States Court for the Eastern District of New York on November 13, 1974, it was adjudged that the defendant, upon his plea of guilty, that he was committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years on the count that I have read, plus special parole term of three years.

That will be the ruling of the Court.

MR. BOITEL: I respectfully except, your Honor. I believe that your Honor's interpretation, both of the rule and of the case law on the subject, fails to take into account the balancing factor which, as a matter of due process, ought to be applied in every such case.

THE COURT: I have taken into consideration the balancing factor, and in view of the circumstances revealed by this record and the line of defense that has been asserted here, the credibility of this defendant, if he takes the stand,

is very much a question for the jury.

This defendant, according to the evidence and the record so far, the defendant, when questioned by the Government officers at the time of his arrest, made a denial of acquaintanceship or knowledge of the two female witnesses who have appeared here, and on the basis of the testimony that has been adduced in this record, the issue of credibility is a very vital one on that subject.

MR. BOITEL: Yes, sir. May I continue my discussion of your Honor's ruling with my client?

THE COURT: Yes.

MR. EPSTEIN: Do you want those documents marked as exhibits?

THE COURT: The indictment in the Eastern District and the judgment of conviction are marked as Court's Exhibits 1 and 2.

XXX (Court Exhibit Numbers 1 and 2, respectively, were marked for identification.)

(Pause.)

MR. BOITEL: Your Honor, may the record reflect that I have advised my client that he has a right to take the stand and testify in his own behalf, and I have explained to him that he may be cross-examined by the United States Attorney and that among other things the United States Attorney, under

your Honor's ruling, would be permitted to bring out the prior conviction.

Based upon these factors, the defendant advises me he does not wish to testify in his own behalf.

I have additionally advised the defendant that without testifying he has a right to expose his body to the jury and that would not subject him to cross-examination, and I have given him my advice as to the desirability of it but still advised him the decision was totally his, and he has decided not to exercise that right.

I have additionally advised him that he is entitled to call his actual wife, who is here in court, as a witness, and he has advised me, after consultation with me, that he does not choose to do so and that he authorizes me to rest in behalf of the defense.

THE COURT: Both sides rest?

MR. EPSTEIN: Yes, both sides rest, your Honor.

THE COURT: Are motions renewed?

MR. BOITEL: The motions are renewed, your Honor.

THE COURT: Same disposition.

MR. BOITEL: Would your Honor think it appropriate now to discuss our requests to charge while the jury is still out?

THE COURT: Yes.

MR. BOITEL: I was provided this morning with the factual statement that the Government has submitted to your Honor as part of its proposed factual charge.

THE COURT: I plan not to charge on the facts.

MR. BOITEL: Thank you, your Honor. That was the direction of my inquiry, so I will say nothing further there.

There is a charge here with regard to false exculpatory statements, request number three of the supplemental request of the Government.

I do not believe that such a charge is applicable to this case.

THE COURT: The question, as I understand it, this false exculpatory statement rests entirely on the evidence of the act that when he was questioned at the time of his arrest, he denied being acquainted with either of the two female witnesses.

MR. BOITEL: That's correct.

THE COURT: Isn't that a false exculpatory statement?

MR. BOITEL: Well, it is if the witnesses -- if those two witnesses are believed. If they are believed, then the ultimate issue in the case is really resolved.

THE COURT: Isn't that true as to false exculpatory statements all the time?

MR. BOITEL: I don't believe it is, because the usual function of this type of charge --

THE COURT: Who can decide whether it was false other than the jury?

MR. BOITEL: I understand. But the usual function this type of charge serves is to show that something that perhaps innocent, were you at a certain place at a certain time, if he denies it and then it is proved, that fits into a pattern and a pattern of deception which does not perhaps go to the ultimate question of guilt or innocence but circumstantially indicates guilt or innocence.

In this case, we really don't have that kind of problem. The total Government evidence in this case depends upon the truthfulness of those two women, and I think that a false exculpatory statement charge here within this context would perhaps be misleading to the jury.

THE COURT: How would you like to phrase it so that it won't be misleading?

Should I add to it the question of whether his denial at the time -- if you believe the testimony of the agents, you must still find that he did, in fact, know these people? Won't that help?

MR. BOITEL: No, I don't follow your Honor's statement.

It seems to me that what we have here within this context is no more of a false exculpatory statement than if a person pleads not guilty.

THE COURT: He was trying to throw off the pursuit. They were clearly trying to tie him to the carriers, admitted carriers of the cocaine, the alleged accomplices, and he was throwing off that line of pursuit by his denial, if the witnesses are to be believed.

MR. BOITEL: That's true, but that is what it ultimately --

THE COURT: That makes it a false exculpatory statement.

MR. EPSTEIN: I think Mr. Boitel's objection is basically that the same witnesses who can establish the falsehood of the statement are the witnesses who can establish the guilt of the defendant, and I don't think that is sufficient basis for not giving the charge.

THE COURT: I think the Government is entitled to that request.

MR. BOITEL: I respectfully except.

In addition, the Government has submitted an accomplice testimony charge which, again --

THE COURT: How about this:

By the way, that accomplice charge has been

specifically approved in a case in which you were counsel, approved by the Court of Appeals.

MR. BOITEL: And your Honor was learned trial judge.

THE COURT: Yes. I delivered that charge.

But in this case, suppose I were to abbreviate it somewhat so as to read as follows:

The two young ladies who came before you were, if you believe their testimony, accomplices of the defendant on trial. An accomplice does not become incompetent as a witness because of her participation in the criminal acts charged. On the contrary, if the only evidence on some or all of the essential elements of any count is the testimony of an accomplice, it may still be of sufficient weight, if you believe it, to sustain a verdict of guilty without corroboration.

Yet, bear in mind that accomplice testimony is to be received with caution and weighed with care. You should not convict on unsupported accomplice testimony, unless you believe that testimony beyond a reasonable doubt.

The Government contends that in any event it has supported the accomplice testimony by corroborating facts and circumstances. The defendant denies this.

MR. BOITEL: Your Honor's charge was perfect until

the last phrase; and that was --

THE COURT: You don't want them to know that they denied it?

MR. BOITEL: The beginning of the last sentence, not the last phrase. I don't know that there is any corroborative evidence whatsoever in this case.

THE COURT: I am perfectly willing to let that be argued to the jury, and I will leave out the statement about the Government's contention, that the Government makes the contention. It can be argued in the summation. I believe that there were corroborative facts indicated in the evidence, but I will leave that entirely to the lawyers to argue.

MR. BOITEL: Just so that I am not consenting to something I am not sure about, can you tell me what that last phrase is?

THE COURT: It is the insert (handing).

(Pause.)

MR. BOITEL: I have absolutely no exception to that charge.

THE COURT: It is an abbreviated form of my previous charge.

All right.

MR. BOITEL: Your Honor, I suppose different

attorneys differ on this -- I know they do -- and that is the request whether the jury ought to be charged on the question of the failure of the defendant to take the stand or the failure of the defendant not to produce evidence, and I suppose sometimes that has to be weighed on the case by case basis.

My own feeling with regard to this case is that it might draw undue attention to the failure of the defense to produce evidence and, therefore, I request that the charge not be given.

THE COURT: All right. I had not intended to make any reference to it. I rarely give that charge unless a defendant requests it.

MR. BOITEL: Yes, sir.

THE COURT: But it is not included in the charge that I have prepared.

You may call the jury in.

(Jury present.)

THE COURT: Ladies and gentlemen, the case has been closed, and you will now hear the arguments of the lawyers concerning what they think has been proved.

You will bear in mind always that it is your view of the evidence that controls. Each lawyer will try to tell you what he thinks they have established.

Mr. Boitel.

MR. BOITEL: Thank you, your Honor.

JUROR NO. 1: Pardon me, Judge. Is it proper for me to ask a question that one of the jurors asked me? I know usually they send you a note, but what they were saying about reading of the testimony, some of them said they still couldn't hear the last witness, she was so quiet.

THE COURT: You didn't hear it sufficiently?

JUROR NO. 1: Someone in back of me said they didn't hear it sufficiently, and they was asking about if it was possible to read it.

THE COURT: Then before we start the summations, I will have the entire testimony of the last witness reread to you. That will save time later on.

(Record read.)

THE COURT: All right, Mr. Boitel, you may now go forward with your summation.

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MR. BOITEL: Thank you, your Honor.

May it please the Court, Mr. Epstein, ladies and gentlemen of the jury.

I would like to first thank you for the careful attention you paid to the evidence in this case. As Mr. Epstein indicated at the outset, a trial of a criminal case is

CHARGE OF THE COURT

THE COURT: Mr. Haney, and ladies and gentlemen of the jury.

I now will give you your instructions on the basis of which you will consider the case that you have heard.

In order to return a verdict of not guilty or guilty on any count in this case, it must be unanimous. Each juror must agree to it. The verdict must be unanimous to the count on which you are reporting and must represent each juror's individual judgment.

It is your exclusive function to determine the facts on the basis of your consideration of the evidence. It is your duty to accept my instructions as to the law to be followed in the case. You will then apply these instructions to the facts as you find them and decide whether or not the defendant on trial before you is guilty of the charges that have been made against him, or any of them.

Through the arguments of the respective counsel you have learned the conclusions which each party believes should be drawn from the evidence presented to you. You must remember, however, that the statements of counsel are not evidence and must not be considered as such. It is your recollection of the facts that counts here. It is for you to determine the weight that will be given to the evidence,

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the credibility that you will extend to the witnesses who testify and the reasonable inferences that are to be drawn from the evidence that has been received.

No inference of guilt or innocence of the defendant on trial or as to the credibility of any witness should be drawn from any rulings or comments that I may have made during the trial. It was neither my intention nor my function to favor one side or the other or to imply that I have any views as to the credibility of either the witnesses or the guilt or innocence of the defendant. That is your sole exclusive function.

The defendant pleaded not guilty to the indictment. That means that the Government has the burden of proving guilt beyond a reasonable doubt with respect to each element of the crime that the defendant is accused of having committed.

The defendant, in our courts, does not have to prove his innocence. He does not have to submit any evidence on the subject of his innocence or any evidence at all if he does not want to.

A defendant is presumed to be innocent and that presumption continues throughout the trial and right through your deliberations. It is only overcome when you have determined on the basis of your resolution of the facts that guilt was established beyond a reasonable doubt on each element of

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the crimes charged.

Reasonable doubt does not mean any old doubt, it means a doubt which is sufficient to cause a prudent person to hesitate to act in a matter of importance to himself or herself.

If the evidence which you believe is such as would induce a prudent person to act without hesitation in a matter of importance to himself or herself, then you may say that you have been convinced beyond a reasonable doubt.

Speculative notions or possibilities resting upon mere conjecture, not arising or deducible from the proof, should not be confounded with reasonable doubt.

A doubt suggested by the ingenuity of counsel or even your own ingenuity, not legitimately warranted by the evidence, or the want of it, or one born of the merciful inclination to permit a defendant to escape the penalty of law or one prompted by sympathy for him or those connected with him, is not what is meant by reasonable doubt.

If, on the other hand, your mind is wavering or uncertain to the point where you have a doubt that would cause a prudent person to hesitate in a matter of importance to him or her, then you have not been convinced beyond a reasonable doubt.

You are going to have to rely in this case on your

own common sense and general experience in evaluating the evidence.

In this case, the evidence adduced has been both of a direct and indirect or circumstantial character.

The Government contends that its evidence establishes the defendant's guilt on each charge beyond a reasonable doubt. The defendant contends that no evidence has overcome the presumption of his innocence, and that at least there is a reasonable doubt of his guilt. You will apply to all the evidence the same standard of proof to satisfy yourselves of the guilt of the defendant beyond a reasonable doubt, or else you must acquit him. You must make your own evaluation of the evidence, including the testimony given by each of the witnesses, and determine the credibility which you choose to give to such evidence.

In weighing the testimony of the witnesses, you can consider their relationship to the Government or to the defendant, if any, as the case may be, and any bias or interest in the outcome of the case, the witness's manner while he or she was testifying, that is, the witness's candor, intelligence, whether the witness equivocated or whether the witness was frank and straight-forward, the extent to which the witness has been corroborated or contradicted by other credible evidence or circumstances or inconsistencies within the

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testimony.

If you believe a witness has willfully testified falsely before you, you are privileged to disregard his or her testimony. A man or a woman may be lying about part of what he or she says and may be telling the truth about all other parts. He or she may be mistaken about parts and be accurate as to other parts. It is for you to decide after you have scrutinized the evidence and weighed the demeanor of the witnesses.

The law recognizes two types of evidence, direct and circumstantial, either of which may be sufficient to convict, providing the jury, upon all the evidence, is satisfied beyond a reasonable doubt.

Direct evidence, of course, is that kind of evidence where a witness was present at a conversation or the commission of an act and testifies to what he or she saw or what he or she heard or discovered, what he or she knows of his or her own knowledge, something which comes to him or her by virtue of the senses of sight or sound or smell.

Circumstantial evidence is, as I think most of you know, evidence that tends to prove a disputed fact by proof of other facts and evidence which has a logical tendency to lead one's mind to conclude a fact in issue actually exists. Circumstantial evidence should not be given any less weight

because it is circumstantial rather than direct.

A simple illustration of circumstantial evidence is this:

Suppose at the time when you came into Court this morning the sun was shining and there were no clouds in the sky. When you came into the trial court room the shades were drawn and the blinds were down so that you couldn't see outside, and pretty soon, someone comes walking into the court room with a dripping umbrella and a dripping raincoat.

You haven't been outside. When you left outside, it was clear, but when these people came in with their dripping umbrellas and raincoats, something may have happened outside. You would be entitled to infer from the circumstance that there is a dripping umbrella and a raincoat that it is raining outside, even though you do not see the rain outside. Thus, circumstantially you infer from a fact, the dripping raincoat and umbrella, some other matter, the rain outside.

The indictment in this case named three defendants. Only one, Elpidio Morales, is on trial before you at this trial. He is the only person whom you will find to be guilty or not guilty in your verdict, although, as I will explain to you shortly, in considering whether he is guilty or not guilty, you may have to determine the nature of the participation of other persons, if any, in this case.

In the determination whether the defendant is guilty or not guilty, you must bear in mind that guilt is personal. Whether the defendant on trial before you is guilty or not guilty must be determined separately with respect to him solely on the evidence presented against him, or the lack of evidence. The case as to this defendant stands or falls on the proof or lack of proof of the charge against him and not against somebody else. Therefore, the fact that other defendants named in the indictment are not before you for consideration at this time and that they have pleaded guilty is not evidence of the guilt of the defendant on trial, or that the crimes charged against him were committed by him. Their pleas of guilty may not be considered by you as evidence against the defendant in any respect, nor any adverse inference be drawn against the defendant by anyone thereof.

The two young ladies who came before you, the co-defendants named, were, if you believe their testimony, accomplices of the defendant on trial. An accomplice does not become incompetent as a witness because of her participation in the criminal acts charged. On the contrary, if the only evidence on some or all of the essential elements of any count is the testimony of an accomplice, it may still be of sufficient weight, if you believe it, to sustain a verdict of guilty without corroboration against the defendant on trial.

Yet bear in mind that accomplice testimony is to be received with caution and weighed with care. You should not convict on unsupported accomplice testimony unless you believe that testimony beyond a reasonable doubt.

An indictment is not evidence, it is merely an accusation. The indictment in this case charges that Morales conspired to distribute or possess for distribution narcotic drug-controlled substances. The two substantive counts accuse him of possessing and distributing such a substance, or with aiding and abetting others with the possession and distributi of it.

The three offenses charged in the indictment against this defendant involve the Comprehensive Drug Abuse Prevention Act of 1970, passed by Congress because of a concern with the illegal distribution of narcotic drugs which have a substantial and detrimental effect on the health and welfare of the people.

The part of this Act which is applicable to the charges here is called the Controlled Substances Act. It is not necessary for you to remember the names of the acts or of their applicable parts, it is sufficient if you remember that the acts forbid the conduct, the essential elements of which I am going to tell you about now.

The term "controlled substances" is used in the Act

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to refer to any drug included in one of five schedules contained in the Controlled Substances Act. Cocaine hydrochloride is a narcotic drug included in Schedule II of the Controlled Substances Act. Cocaine hydrochloride is, thus, a controlled substance.

Among other things, the law says that it is unlawful for any person to knowingly or intentionally distribute or possess with intent to distribute any controlled substance, such as cocaine hydrochloride, and any person who conspires to commit such an offense or aids and abets another or others to commit any such offense, commits a crime.

To simplify your consideration of this matter, I will turn first to Counts 2 and 3, which we lawyers and judges refer to as substantive counts.

Substantive is to be distinguished from the scheming count. Substantive means something was carried out. Conspiracy means that it was schemed.

We are now talking about Counts 2 and 3, which are the substantive counts.

These charge the defendant Morales or Gonzalez with possessing and distributing a narcotic controlled substance, in this case, cocaine hydrochloride, or with aiding and abetting Gerena and Segui to possess and distribute.

Before you can find the defendant guilty on Counts

2 and 3, you must be convinced beyond a reasonable doubt that the Government has proved each of the following elements:

First, that on or about October 2nd, 1974, which is Count 2, and October 3rd, 1974, Count 3, the defendant did distribute or possess with intent to distribute a narcotic drug controlled substance.

Secondly, that he did so unlawfully, intentionally and knowingly.

And third, that the substances in Government Exhibits 1-A and 2-A were, in fact, cocaine hydrochloride, a narcotic drug controlled substance.

I should say to you at this point that the parties in this case stipulated that the substance which the girls carried and attempted to sell, according to their testimony, was found by a chemist to be cocaine hydrochloride and that it was stipulated that a chemist, if called, would so testify that it was cocaine hydrochloride, but nonetheless, it is your obligation to find as one of the essential elements that we are dealing here with cocaine hydrochloride, and you must find that beyond a reasonable doubt.

Under the second and third counts, the Government also relies on the aiding and abetting law, which I will explain to you in a moment.

You will note that the first element that I mentioned

includes the phrase "possession with intent to distribute." What does that mean?

The word "possess" means to have an actual, physical custody of something or have it in your control. To have something in your control does not require that you have it in your hand or your pocket.

Possession may be of two types, actual or constructive. Actually, possession means that a defendant knowingly has personal, manual or physical control of the drug. Constructive possession means that although the drugs are in the physical possession of another person, a defendant knowingly has the power to exercise control over them or over their distribution or to direct their movement or to cause their delivery.

In other words, to possess something, you need not have it in your hand or in your pocket. If it is within your power to exercise control over the drugs, you have possession of them.

The word "distribute" means the actual or constructive or attempted transfer of the drug, and the word "possession" means to have something in your control irrespective whether or not it is under your immediate physical possession.

The word "intent" refers to a person's state of mind.

Accordingly, the term "possess with intent to distribute" means to control an item with a state of mind or purpose to transfer that item.

As to the second element, the term, "unlawfully, willfully and knowingly," means that you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing and that he did it deliberately and voluntarily as opposed to mistakenly or accidentally or as a result of some coercion. Of course, it is not necessary that the defendant knew he was violating any particular law, rather, it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts or alleged participation or aiding and abetting, if he did.

While ignorance of the law is no excuse, ignorance of duty imposed by law may negate willfullness and the failure to perform duty.

The elements of knowledge, willfullness and intent and motive of the defendant need not be proved by direct evidence. You can't see into a person's mind. Like any other fact in issue, these elements may be established by circumstantial evidence, namely, acts or statements of the defendant which manifest a guilty mind or consciousness of guilt.

The significant fact is the defendant's state of mind. And intent exists in the mind. Since it is not possible

to look into a man's mind to see what went on, the only way you have for arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Knowledge and intent may be inferred from all the surrounding circumstances. Direct proof is not necessary.

As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts.

As to the third essential element, I have already indicated to you that the indictment charges that the narcotic drug controlled substance in these Counts 2 and 3 is cocaine hydrochloride. If I didn't do so before, I instruct you as a matter of law that cocaine hydrochloride is a narcotic drug controlled substance.

As I told you previously, the Government relies on the aiding and abetting statute under Counts 2 and 3. That statute, which is known as Title 18 of the United States Code, Section 2, reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures

its commission is punishable as a principal. Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

It is not necessary, then, for the Government to show that the defendant personally committed the crimes charged in Counts 2 and 3 himself. Rather, a person who aids and abets another or others to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find the defendant guilty of the offense charged if you find beyond a reasonable doubt that the defendants Gerena and Segui committed the offenses charged, and that the defendant Morales aided and abetted them.

To determine whether a defendant aided and abetted the commission of an offense, you ask yourselves these questions:

Did he associate himself with the venture? Did he participate in something he wished to bring about? Did he seek by his actions to make it successful? If he did, then he is an aider and abetter.

Now, I turn to Count 1, the so-called conspiracy count, the scheming or plotting charge.

The defendant has been indicted also for the crime

of conspiracy to commit the offense of distributing cocaine or possessing the same with intent to distribute the same.

To convict any defendant of the offense of conspiracy, the Government must prove beyond a reasonable doubt the existence of a conspiracy, in this case a conspiracy in the Southern District of New York, from on or about the first day of March, 1974 and continuously thereafter until the indictment was filed on November 14, 1974, the object of the conspiracy being to commit the offense of knowingly or intentionally distributing or possession with the intent to distribute cocaine.

It is not necessary that the Government prove that the conspiracy lasted during the entire period, it is enough if it proves that there was a conspiracy during some significant part of the period. The Government must prove, second, that the defendant was a member of a conspiracy and, third, that during its existence, at least one other overt act, which means an open act, was committed by one or more of the members of the conspiracy in furtherance of the objectives of the conspiracy.

It is the conspiracy or scheme or plot to commit the offense which I have mentioned that is the crime charged, and that may be established regardless whether the purposes of the conspiracy were accomplished, carried out, or whether

the substantive crimes were committed.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose or a lawful purpose by unlawful means. While it involves an agreement to violate the law, it is not necessary that the Government shall have proved that the persons charged met together and entered into an express or formal agreement or that they stated in words or writing what the scheme was and how it was to be effected. It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful act. Such an agreement may be inferred from the circumstances and the conduct of the parties, since ordinarily a conspiracy is characterized by secrecy.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of another participant unless it has first been established that a conspiracy existed and that he was one of its members. To be a member of a conspiracy, a defendant need not know all of the members nor all of the details of the conspiracy nor the means by which the objects were to be accomplished.

Each member of a conspiracy may perform separate and distinct acts. Mere association with one or more conspirators does not make one a member of a conspiracy, nor is knowledge without participation sufficient. Mere presence during the commission of an alleged crime does not make a person a party to it. This principle applies to all counts in the indictment, including the conspiracy count.

It is necessary that the Government prove beyond a reasonable doubt that the defendant Morales was aware of the common purpose, if any, and was a willing participant with specific criminal intent to advance the illegal purpose of the conspiracy.

The extent of the defendant's participation, if any, is not determinative of his guilt or innocence. The defendant may be convicted as a conspirator even though he plays a minor part in the conspiracy. His stake, if any, in the venture is a factor to be considered in determining whether a conspiracy existed and whether the defendant was a member of it.

If it is established beyond a reasonable doubt that a conspiracy existed and that the defendant was one of its members, then the acts and declarations of any other member of such conspiracy in or out of the defendant's presence done in furtherance of the object of the conspiracy and during its existence may be considered as evidence against such

defendant for the purposes of the conspiracy count. This follows because when persons enter into an agreement for an unlawful purpose, they become agents for one another. It is commonly referred to as a partnership in crime. Hence, the acts or declarations of one are deemed to be the acts of all, and all are responsible for such acts and declarations, even though made in the absence of and without the knowledge of the defendant.

However, statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making them.

It is not necessary that all of the overt acts charged in the indictment were performed, one overt act is sufficient. An overt act means any act committed by one or more of the conspirators out in the open to accomplish a purpose of the conspiracy. It need not be an act in violation of the law, nor is it necessary for other conspirators to join in it or even know about it. It is necessary only that such act be in furtherance of the purpose or objects of the conspiracy.

If the jury finds beyond a reasonable doubt that a conspiracy existed as charged in the indictment and that during the existence of the conspiracy one of the overt acts

alleged in the indictment was knowingly done by one or more of the alleged conspirators in furtherance of some object of the alleged conspiracy, proof of the conspiracy count is then complete. It is complete as to each defendant found by the jury beyond a reasonable doubt to have been knowingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of when the conspirators committed the overt act.

I will now read to you the overt acts which are charged in the indictment.

As I mentioned, the Government must prove only one or at least one of these overt acts was committed in furtherance of and during the course of the conspiracy as charged. The indictment on this subject of overt acts reads:

"In furtherance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

"1. On or about October 2, 1974, Milagros Gerena entered the Holiday Inn, 440 West 57th Street, New York, New York.

"2. On or about October 3, 1974, Milagros Gerena entered an apartment located at 1120 Wyatt Street, Bronx, New York.

"3. On or about October 3, 1974, in an apartment

located at 1120 Wyatt Street, Bronx, New York, Elpidio Morales, also known as Bigue Gonzalez, handed a package to Milagros Gerena.

"4. On or about October 3, 1974, Milagros Gerena and Gricel Segui entered an apartment located at 333 East 55th Street, New York."

If the jury finds that any one of those four acts was done and that it was in furtherance of the conspiracy charged, then the requirement of an overt act has been satisfied.

I have instructed you as to the crime of conspiracy with which the defendant Morales is charged in Count 1. If you find pursuant to those instructions the existence of a criminal conspiracy or partnership and that the defendant was a co-conspirator or partner and guilty under Count 1, you may find him guilty as well under Counts 2 and/or 3, provided you also find as to those counts that the crime as to Count 2 was committed and that it was committed during and in furtherance of the conspiracy charged in Count 1, and as to Count 3, you must find that the crime charged in Count 3 was committed and that it was committed during and in furtherance of the conspiracy charged in Count 1.

If you find these to be the facts, then each and every member of the conspiracy was personally responsible for

each crime committed in furtherance of the conspiracy and may be found guilty of that crime, regardless of whether he personally committed it or even aided or abetted in that crime.

In order for you to attribute a substantive offense from one conspirator to another, the offense must have been more than just an unforeseen part of the ramifications of the plan. The reason for these rules is that a co-conspirator committing a crime is an agent of all the other members of the conspiracy.

Now, if you do not find that the defendant was a member of the conspiracy alleged, or if you do not find that the crime charged in Count 2 was committed, or that the crime in Count 3 was committed during the pendency of the alleged conspiracy, or if you do not find the crime charged in the substantive count you are considering was done in furtherance of the conspiracy, then you may not find the defendant guilty under the particular count you are considering, unless the Government has proved beyond a reasonable doubt that along with the other elements I have given you the defendant did or aided and abetted one or more of the acts charged in that particular count.

I repeat, each count must be separately and individually considered and the essential elements thereof must be

separately and individually established beyond a reasonable doubt.

For simplicity, Count 1 is the conspiracy or scheming count, Count 2 is the count that related to the small quantity of the narcotic, Count 3 was the eighth of a kilo count.

In the context of this case, these instructions mean that if you find there to be a conspiracy among Morales, Gerena and/or Segui, and that any one of them actually distributed cocaine and possessed it with intent to distribute it as a part of or in furtherance of the conspiracy, then Morales, if a member of the conspiracy at that time, could be found guilty on the substantive count as if he physically distributed and possessed it. This follows from the fact that a conspiracy is a partnership in crime, and the acts of one bind the other partners.

There has been testimony by the Government agents that the defendant at the time of his arrest, when questioned, denied to the agents that he was acquainted with either or both of the two young ladies, the co-defendants who appeared before you on the trial. They have told you of their acquaintance and contacts with the defendant. You will have to evaluate the credibility of their testimony.

I charge you that exculpatory statements of a

defendant when apprehended, statements to throw off the authorities from pursuit of crime and investigation of it, when shown by evidence that you credit to be false, are circumstantial evidence of guilty consciousness and have independent probative force.

Finally, what this case gets down to is the question to be answered by the exercise of your common sense with respect to the evidence that you heard.

Under your oath as jurors, you cannot allow consideration of the punishment which might be imposed upon a defendant, if convicted, to influence your verdict in any way or in any sense to enter into your deliberations. The decision as to what type of sentence should be imposed is my responsibility. That rests exclusively on me in the event of a conviction.

Your function is to weigh the evidence in the case and to determine whether the defendant on trial before you is guilty or not guilty of the particular count you are considering, to be decided by you solely on the basis of the evidence and the law. You are to decide the case upon the evidence and the evidence alone, and you must not be influenced by any assumptions, conjectures or sympathy in the case.

Your verdict in this case, when you get ready to report it, will be on each count separately, either guilty or

not guilty, and your verdict will be announced by your foreman, Mr. Haney, who is the gentleman who sits in the first seat. He will be provided with pencil and paper should you wish to communicate with the Court. Please do not communicate with anyone, not even me, except in writing and have the writing signed by Mr. Haney in his name.

I have now concluded my instructions, but I want to take a moment to talk to the lawyers. They may wish to call to my attention something I may have overlooked or on which I may have misspoken. So if the jurors will relax for a moment, I will talk to the lawyers and come back to you.

(At the side bar.)

THE COURT: Are there any exceptions or requests, Mr. Boitel:

MR. BOITEL: Other than what has already been put on the record, the only exception I have is to that portion of your charge in which you alluded to the legislative concern. I realize what the authorities have to say about the subject, but I nevertheless press the objection within the context of a case such as this.

In the alternative, I respectfully request that your Honor charge the jury that legislative concern has nothing to do with the defendant's guilt and does not in any way water down the standard of proof required to establish guilt.

THE COURT: Are there any exceptions or requests on the part of the Government?

MR. EPSTEIN: No, your Honor.

THE COURT: All right.

(In open court.)

(Two marshals were duly sworn.)

THE COURT: Miss Kenny, you have sat with us as an alternate juror. We have all twelve jurors present, and your alternate status is not required. You may be excused with the thanks of the Court.

(Alternate juror excused.)

THE COURT: As to the other jurors, I am going to suggest to the marshal that they furnish you with menus and they will send out for lunch and give you an opportunity to spend as much of this afternoon as you can on your deliberations and lunch will be brought in to you.

Mr. Haney, you may now retire with the jurors.

(At 12:50 P.M., the jury retired to the jury room to deliberate upon a verdict.)

THE COURT: Are there any exhibits that need be segregated here and left with the Clerk?

MR. EPSTEIN: The only exhibits that I produced were the stipulations, the two narcotic exhibits and the rest of the exhibits were introduced at the Simmons hearing, not

at the trial.

THE COURT: Have you a spare copy of the indictment, if that is called for?

MR. EPSTEIN: Yes, I do.

THE COURT: I have one here.

Look this over, gentlemen, and see whether this is satisfactory to submit if the jurors should call for a copy of the indictment (handing,.

MR. EPSTEIN: It is satisfactory.

MR. BOITEL: It is satisfactory.

THE COURT: That may be handed to the Clerk, and if the jurors call for a copy of the indictment, that will be sent in.

The Court will stand in recess. I expect if counsel has other chores to do, we can stand in recess until two-thirty in this case at least. I will start another trial at two o'clock. But with the lunch hour intervening here, I don't think we will hear from them earlier than two-thirty, and if we do, they will have just to wait and give you an opportunity to return at two-thirty.

MR. BOITEL: Thank you, your Honor.

(A note was received from the jury at two o'clock p.m.)

(At 2:45 P.M., in open court, jury present.)

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THE COURT: Mr. Haney, I think that we have found those portions of the charge that you have requested and in the interest of furnishing you with the information, I will have the reporter read so much of it as I don't have a note of, and then I will read to you other portions of the charge of which I do have a note, and when we have concluded, you tell me whether we have satisfied the two notes that you sent in.

The reporter will first read the last portion of the charge which explained simply the first, second and third counts of the indictment.

(A portion of the charge was read to the jury.)

THE COURT: In the charge, I instructed you as follows:

I have instructed you as to the crime of conspiracy with which the defendant Morales is charged in Count 1. If you find pursuant to those instructions the existence of a criminal conspiracy and that the defendant was a co-conspirator and guilty under Count 1, you may find him guilty as well under Counts 2 and/or 3, provided you also find the following:

You must find as to Count 2 that the crime in relation to the small quantity of cocaine charged in Count 2 was committed and that it was committed during and in further-

ance of the conspiracy charged in the conspiracy count, and as to Count 3 you must find that the crime charged in Count 3 in relation to the larger quantity of cocaine was committed and that it was committed during and in furtherance of the conspiracy charged in Count 1.

If you find these to be the facts, then each and every member of the conspiracy was personally responsible for each crime committed in furtherance of the conspiracy and may be found guilty of that crime regardless of whether he personally committed it or even aided or abetted in that crime.

On the subject of conspiracy, I charged as follows, in part.

If the jury finds beyond a reasonable doubt that a conspiracy existed as charged in the indictment and that during the existence of the conspiracy one of the overt acts alleged in the indictment was knowingly done by one or more of the conspirators in furtherance of some object of the conspiracy, proof of the conspiracy offense is then complete. It is complete as to each defendant found by the jury beyond a reasonable doubt to have been knowingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of when the conspirators committed the overt act or who committed it.

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As to the substantive counts 2 and 3, I said this:

These charged the defendant with possessing and distributing a narcotic controlled substance, in this case cocaine hydrochloride, or with aiding and abetting the defendant Gerena and the defendant Segui to possess and distribute.

Before you can find the defendant guilty on Counts 2 and 3, you must be convinced beyond a reasonable doubt that the Government has proved the following elements:

First, that on or about October 2, 1974, which relates to Count 2, the small quantity, and on or about October 3, 1974, the larger quantity, Count 3, the defendant did distribute or possess with intent to distribute a narcotic drug controlled substance. Second, that he did so unlawfully, intentionally and knowingly and, third, that the substance in Government Exhibits 1-A and 2-A is, in fact, cocaine hydrochloride, a narcotic drug controlled substance.

I then explained to you that under the second and third counts the Government also relies on the aiding and abetting law, and I believe that that has been covered and you haven't asked for any further reference to aiding and abetting, other than the fact to determine whether a defendant aided and abetted the commission of an offense, you ask yourselves these questions:

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Did he associate himself with the venture? Did he participate in something he wished to bring about? Did he seek by his actions to make it successful? If he did, then he is an aider and abetter.

Finally, in response to your questions, your verdict in this case, when you get ready to report it, will be on each count separately either guilty or not guilty.

In answer to your question, "If number one is guilty or not guilty, does it necessarily mean two or three is the same?" The answer is that each count stands on its own, subject to what I said about the conspiracy agreement which might bring the conspirator into liability for two and three if he was a partner in a crime, and the crime in two or three or both was committed during the conspiracy and he was a knowing and willful participant in it.

Does that explain all the questions that you had in mind?

JUROR NO. 1: It does to me.

THE COURT: I am sorry I had to interrupt your lunch, but we have another jury and another case going on and if that is what you wanted to know, you may retire with your deliberations.

JUROR NO. 1: Thank you very much, Judge.

(At 3:50 P.M., the jury returned to the

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jury room to continue to deliberate upon a verdict.)

(At 5:10 P.M. in open court; jury present.)

THE COURT: Ladies and gentlemen, I have your note that came in a short time ago, which reads in the first person, "I am sorry to report that we, the jury, is hopelessly deadlocked and cannot reach a unanimous decision," signed by Mr. Haney, the foreman.

The case has hardly received the sufficient attention that it deserves, nor is it a case that would seem to be beyond the capacity of intelligent, reasonable-minded jurors to grasp and consider and decide.

So, I am going to suspend your deliberations now for the afternoon and ask you to return tomorrow morning at 9:30 to continue your deliberations in the endeavor to conclude this case.

If there is any difficulty arising due to any matter of recollection, there will be no difficulty in having parts of the charge reread to you or parts of the evidence reread to you. But it has been an extremely short trial, and while the charge may have been a little lengthy, giving you the legal instructions, I hope they were clear. It was a short trial, and the matters involved here which are not of any essential difficulty to resolve, an effort should be made to see if the jury can agree on all or any one of the charges

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that are involved here.

Accordingly, I am going to ask you to suspend your consideration of this case, not to discuss it further among yourselves, certainly not to discuss it outside of your jury room with anybody, on any aspect of it, not even to think about it tonight or until you reconvene tomorrow morning and with all present, then as a jury, resume your deliberations on the case.

Perhaps the pressure of having to eat in on a day like this has made some people tired. At all events, suspending at this time, it is late in the afternoon, will give you an opportunity to rest and be refreshed and resume your labors on the case diligently tomorrow morning.

So I bid you good afternoon, bearing in mind what I have told you. Please do not under any circumstances discuss this case among yourselves or with anybody else whatsoever until you return here tomorrow and with all present in the jury assembly room, where you have been assembled, then begin your deliberations afresh.

Good night and a pleasant rest.

(The jury left the court room.)

THE COURT: We stand adjourned accordingly.

MR. BOITEL: May we remain for a moment, your Honor?

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THE COURT: 9:30 is not for you. The lawyers don't need come until later, about ten o'clock, and hopefully we won't have any questions to answer between 9:30 and ten, but I will be here on this other case, which is on trial.

MR. BOITEL: I would like to take respectful exception to your Honor's --

THE COURT: Hold that jury down there, don't let them go down.

MR. BOITEL: I would like to take respectful exception to your Honor's statement to the jury that the subject matter of this case -- I am only paraphrasing -- is not complex and should not be difficult to resolve for reasonable minds, or words to that effect.

It seems to me that the jury here is confronted with one of the most difficult decisions, and that is weighing that intangible thing called credibility, and that is always difficult to resolve.

I don't think that it should be in any way minimized to the jury, nor should it be suggested that they are not in any way fulfilling their function in finding such a problem difficult to resolve. Upon that basis, I move for a mistrial.

THE COURT: This suggestion on your part comes,

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unfortunately, at a time after I have excused the jury and should have been noted to the Court, if you had any remarks to make about it.

I really think it is out of order, unwarranted and no suggestion whatsoever was made to the jury along the lines that you speak of, and it was clearly evidenced to the jury that the issue is one, basically, of credibility, as well as the other matters that were described.

I am frank to say I am somewhat surprised that a man of your stature in the courts make this motion, which is unequivocally denied.

THE CLERK: The jurors are excused, your Honor?

THE COURT: Yes.

(Adjournment taken to January 16, 1975 at 10:00 o'clock A.M.)

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UNITED STATES OF AMERICA

versus 74 Cr. 1075

ELPIDIO MORALES

January 16, 1975

(At 9:45 A.M., the jury assembled in the jury room to continue to deliberate upon a verdict.)

(At 2:45 P.M., in open court, jury present.)

THE COURT: Call the attendance.

(Jury roll call; all present.)

THE CLERK: Mr. Foreman, have you reached a verdict as to the Defendant Elpidio Morales on Count 1?

THE FOREMAN: We have.

THE CLERK: And what is your verdict?

THE FOREMAN: Guilty.

THE CLERK: Count 2?

THE FOREMAN: Guilty.

THE CLERK: And Count 3?

THE FOREMAN: Guilty.

THE COURT: Poll the jury.

THE CLERK: Members of the jury, please listen to your verdict as it stands recorded.

You say you find the Defendant Elpidio Morales guilty as charged on each of Counts 1, 2 and 3.

(Each juror, upon being asked, "Is that your verdict?" answered in the affirmative.)

THE COURT: Ladies and gentlemen, that completes your service in this case and you are now discharged. I believe it also completes your jury service for this term.

While it is not of any relevancy to your deliberations on the case that you did have, you will be interested to know that Mr. Elpidio Morales pleaded guilty on November 13, 1974 to cocaine conspiracy in which he engaged in July of 1972, so that one month after the transactions that this jury deliberated on, one month before, that is, in October, he had the transactions on which you, the jury, functioned and have now reported as having been had by him, and one month later he pleaded guilty to having done the same thing in the Eastern District of New York two years earlier for which he was sentenced to five years in prison.

You are now excused.

(Jury excused.)

THE COURT: Mr. Boitel, any motions?

MR. BOITEL: Your Honor, may I reserve motions until sentence?

THE COURT: Those that you can make orally, why don't you make them now.

MR. BOITEL: I would like to renew all the motions

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made during the course of the trial.

THE COURT: All right. Those motions are denied. I think that the issue as correctly stated by you was one of credibility. The identification was, under the circumstances, a most interesting and rather indicative form of identification, and perhaps that was the only question, really, to be decided, and that seems to have been appropriately decided.

I will deny your general motions. If there is anything else you think of within the seven days, you have leave to present those.

The defendant is in custody at the present time, so there isn't any question about bail, and a recent pre-sentence report has been prepared in the Eastern District of New York, and we will let our probation department procure it and, if necessary, bring it up to date.

Apparently he was sentenced in November, so that there isn't very much updating that is necessary.

MR. EPSTEIN: Your Honor, if I can interject, I called the probation office on Monday pursuant to your direction and told them to call the Eastern District. They told me the Eastern District on Monday was going to send over the pre-sentence report.

I would like to add Mr. Morales pleaded guilty in the Eastern District early in 1973, and it would be my

assumption that the probation report was probably prepared early in 1973.

He became a fugitive.

THE COURT: That is not what this judgment says. It says he pleaded guilty on November 13, 1974.

MR. EPSTEIN: I would suspect the judgment is incorrect. He was sentenced on November 13.

THE COURT: Wait a minute.

MR. EPSTEIN: He was sentenced on November 13, 1974. He pleaded guilty and jumped bail.

THE COURT: This was the sentence date?

MR. EPSTEIN: Yes, that is the date of sentence.

THE COURT: He jumped bail after the date of guilty? I see. Then I was in error, as to the gratuitous information I supplied following the verdict.

That means there has to be an updating.

MR. EPSTEIN: I should think so, your Honor, yes.

THE COURT: Is there any preference that you have, Mr. Boitel, as far as dates on your calendar?

MR. BOITEL: No, sir.

MR. EPSTEIN: Your Honor, I have one preference. I would like a date other than February 26, which is the date of the sentence for the two women.

THE COURT: Since he is in custody, there is no

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great rush about having it done this month.

MR. BOITEL: May I suggest that perhaps your Honor would rather not set a date and maybe there is an updated report as of the time of the sentence.

I think usually -- I would think under these circumstances they would have updated it before the man was actually sentenced. If there is --

THE COURT: There had to be an updating up to November, and your point is if there is, I can move the sentence here.

MR. BOITEL: That's right.

THE COURT: All right. We will leave the sentence date open to be communicated to counsel of the defendant. If there is an updated report, we can have the sentence next week. If there isn't an updated report, I will set a date other than the day you mentioned.

MR. EPSTEIN: Fine.

Your Honor, they probably have the pre-sentence report already in the office.

THE COURT: I will take it all up with probation, unless you want to stop in there and talk to Mr. Connolly, find out what the status is of the report, whether it is sufficiently updated for the purposes of the probation department in the Southern District of New York, and if it is, then

we will have the sentence at a time convenient to both you gentlemen next week.

MR. EPSTEIN: I will be glad to do that, your Honor.

THE COURT: Thank you very much, gentlemen. I thought it was a well tried case, extremely well tried by a criminal justice agent lawyer and refreshingly so.

MR. BOITEL: Thank you, your Honor.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

United States of America

-v-

Elpidio Morales, a/k/a Bigue Gonzalez,

Defendant.

74 Cr. 1075

New York, N. Y.

January 28, 1975

10 am

Room 906

Before:

Hon. Milton Pollack,

District Judge.

A P P E A R A N C E S:

Paul J. Curran, Esq.,
United States Attorney;
Jeremy G. Epstein, Esq.,
Assistant U. S. Attorney,
of counsel.

Henry Boitel, Esq., Attorney for defendant.

Also present:

Miss Sylvia Aguilar, Interpreter

MR. EPSTEIN: May the record reflect that prior to trial I turned over Government's exhibits 3501 through 3527 to defendant.

MR. BOITEL: May the record reflect that I acknowledge having received that material.

THE CLERK: United States of America v Epidio Morales for sentence.

Are counsel ready?

MR. EPSTEIN: Yes, the Government is ready.

MR. BOITEL: Defendant is ready, your Honor.

THE COURT: Swear the interpreter, please.

(Miss Sylvia Aguilar sworn as Spanish interpreter by the Clerk)

THE COURT: Mr. Boitel, is there anything that you want to day on behalf of Epidio Morales as to imposition of sentence?

MR. BOITEL: Yes, sir. I have spoken with the defendant again this morning. He has asked that I make a statement in his behalf. His request is that he humbly requests the court to be lenient with him, particularly in view of the existing 5-year sentence which was imposed upon him by Judge Neaher in the United States District Court for the Eastern District of New York.

As Your Honor is aware, defendant claimed that he was innocent of the charges in the present case.

At this stage of the proceedings any question of guilt or innocence is really not relevant; the jury has spoken, and I know that your Honor, and I myself, must proceed upon the fact of a verdict of guilty. I think, though, that the evidence in the case indicates at least with regard to the two women who testified as government witnesses, that the defendant could not be considered any sort of major operator; they did not seem to have any knowledge of significant activites on his part, other than those facts which were revealed in this particular case concerning the transfer of an eighth of a kilo of cocaine.

I think with regard to the question of the defendant's existing sentence in the Eastern District of New York, it is my obligation to advise the court that following the verdict in this case the defendant very urgently requested that I communicate to Judge Neaher that the defendant, at the time of his plea of guilty in the Eastern District, did not have an interpreter, and was confused as to the substance of the proceedings, as to what was being said.

I did communicate that fact to Judge Neaher, and Judge Neaher in a letter dated January 24, 1975 advised

me that he was taking the matter into consideration, and had ordered a copy of the transcript of the defendant's plea.

I also was contacted by the chief of appeals in the Eastern District, Mr. Paul Bergman, who advised me that the docket sheet in the case did not indicate that the defendant had been supplied with an interpreter at the time of the plea or had been supplied with an interpreter at the time of sentence.

In this morning's mail I received a letter from Judge Neaher, dated January 27, 1975, which states as follows:

"Dear Mr. Boitel:

"In further reply to your letter of January 16, 1975, I have now reviewed the minutes of your client's plea and sentencing in this court in the above case. Having done so I plan to take no further action on the information provided.

"Copies of the minutes will be available in the court file....should your client or anyone on his behalf be interested in reviewing them."

And so it would appear that the defendant's conviction in the Eastern District is final. He is serving a 5-year sentence, and I would respectfully request

that your Honor be as lenient as possible with him.

THE COURT: Elpidio Morales, do you want to say anything on your own behalf before imposition of sentence?

THE DEFENDANT: (Through the interpreter) Yes.

THE COURT: What is it you wish to say to me?

THE DEFENDANT: Judge, I feel that the court should take into consideration that in my case I still consider myself innocent, even though the court has found me guilty.

Furthermore, in reference to the case in the Eastern District I still consider myself innocent even though I have pleaded guilty and the court accepted my plea of guilty, and I do know that that case has nothing to do with this.

Furthermore, I want you to take into consideration that I am the father of a family, and I want to continue my life.

THE COURT: He is the father of a family? Does he live with his wife?

(The interpreter speaks with the defendant)

THE DEFENDANT: (Through the interpreter) Yes.

THE COURT: According to the probation report that I have here, this defendant made a statement to the probation officer that following his plea of guilty in December of 1972 in the Eastern District he separated from his wife, Gloria Gonzalez, establishing residence by himself in Manhattan.

Furthermore, that the defendant's wife had recently commenced living with another man, and retains custody of their child, Maria, age 8.

The Probation officer also reported that since the defendant's plea of guilty he claims he has resided with family and friends primarily in Manhattan; that for the past 5 months--that means 5 months before November of 1974--he states that he has resided in a furnished room with a weekly rental of $22.00, located at 318 West 90th Street, Manhattan.

Further, the defendant indicated that for the past 7 months he has been unemployed, being solely supported by family and personal savings.

So his statements to me now that he is a family man residing with his family seems to be badly inconsistent with the information that he gave to the pro-

bation officer.

THE INTERPRETER: May I speak to him?

THE COURT: Yes.

(The interpreter speaks with the defendant)

THE DEFENDANT: First, Judge, I reunited with my wife.

Further, the agent that made the report never went to my house to see whether I live with my family or not. Also, my wife was here while I was on trial. A phone call can be made to her to prove that, and I have never lived on West 90th Street, as it is from the report.

THE COURT: I have no reason to doubt the authenticity and accuracy of the statements in this probation report.

At all events, the sentence will not take into account any state of facts which may relate to whether he is or is not living with his wife, or whether she is or is not living with him, or is or is not living with somebody else.

Sufficient was indicated during the trial of this case, and the lengths to which the defendant pushed the government in its identification procedures indicate that the defendant was very aware of the situation.

The probation report in the Eastern District indicated hand-to-hand transactions in cocaine by this defendant in 1972.

There is no indication of any gainful employment, of sufficient means created by gainful employment by this defendant between 1972 and 1974 when he was picked up after jumping bail and brought in for sentence before Judge Neaher.

Is there anything else that the defendant wants to call to my attention before imposition of sentence?

THE DEFENDANT: I wish to have another chance so I can reunite with my family and continue my life.

THE COURT: Anything else?

THE DEFENDANT: What you wish to do with me is up to you.

THE COURT: It is the judgment of the Court that this defendant be committed to the custody of the Attorney General or his authorized representative for a term of 8 years to be followed by 3 years of special parole, pursuant to Title 21, Section 841. This sentence is to be on each of counts 1, 2 and 3 on which he was convicted, and to run concurrently with the sentence

imposed in the Eastern District on November 13, 1974 by Judge Neaher in the Eastern District of New York, docket number 72 Cr. 932.

The defendant is remanded.

MR. BOITEL: Your Honor, so that the record is clear, he is sentenced to that 8 years plus 3 years special parole on each of the 3 counts to be served concurrently with the Eastern District case.

THE COURT: Correct.

MR. BOITEL: Thank you, your Honor.

May I place on the record that I have advised the defendant of his right to appeal, and that the defendant has requested that an appeal by taken of the conviction in this case; and I have given the appropriate documents to the clerk of this court.

May I request that the clerk be directed to file a notice of appeal in the defendant's behalf?

THE COURT: The clerk is directed to file a notice of appeal in forma pauperis.

MR. BOITEL: Thank you, your Honor.

MR. EPSTEIN: Thank you.

- - -

EJB:EAM:lag
F.#723,727

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

72CR 932

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

Cr. No. _____
(21 U.S.C., §§841(a)(1) and 846; 18 U.S.C., §2)

ELPIDIO MORALES and JUAN GONZALEZ,

Defendants.

AUG 3 1972

NEAHER, J.

- - - - - - - - - - - - - - - - - X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 18th day of July 1972, within the Eastern District of New York, the defendant ELPIDIO MORALES unlawfully, knowingly and intentionally did possess with intent to distribute, approximately sixty two (62) grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1).)

COUNT TWO

On or about the 18th day of July 1972, within the Eastern District of New York, the defendant ELPIDIO MORALES unlawfully, knowingly and wilfully did distribute approximately sixty two (62) grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1).)

COUNT THREE

On or about the 26th day of July 1972, within the Eastern District of New York, the defendant ELPIDIO MORALES and the defendant JUAN GONZALEZ unlawfully, knowingly and intentionally did possess with intent to distribute, approximately sixty seven (67) grams of cocaine

hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1); Title 18 United States Code, Section 2.)

COUNT FOUR

On or about the 26th day of July 1972, within the Eastern District of New York, and elsewhere, the defendant ELPIDIO MORALES and the defendant JUAN GONZALEZ did knowingly and intentionally conspire to commit offenses against the United States in violation Section 841(a)(1), Title 21 United States Code, by unlawfully, knowingly and intentionally possessing with intent to distribute quantities of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 846.)

A TRUE BILL.

_____
FOREMAN

_____
ROBERT A. MORSE
United States Attorney
Eastern District of New York

JUDGMENT AND COMMITMENT (Rev. 2-68) Cr. Form No. 25a

United States District Court
FOR THE
EASTERN DISTRICT OF NEW YORK

723727
Lazarus
Cl 11-13-74

United States of America

v.

ELPIRIO MORALES

No. 72CR932

On this 13th day of November, 1974 came the attorney for the government and the defendant appeared in person and[1] with counsel

It Is Adjudged that the defendant upon his plea of[2] guilty and the court being satisfied that there is a factual basis for the plea

has been convicted of the offense of violating T-21, U.S. Code, Section 846, in that on or about July 26, 1972, the defendant and another, did knowingly and intentionally conspire to commit offenses against the United States in violation 841(a)(1), Title 21 United States Code, by unlawfully, knowingly and intentionally possessing with intent to distribute quantities of cocaine hydrochloride, a Schedule 11 narcotic drug controlled substance

as charged[3] in count 4

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] 5 years on count 4 pursuant to T-18, U.S.Code, Sec. 4208(a)(2) plus special parole term of 3 years on count 4. On motion of Asst. U.S. Atty. Caden counts 1, 2 & 3 are dismissed.

It Is Adjudged that[5]
XXXXXXXXXXXXXX

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Edward R. Neaher
United States District Judge.

The Court recommends commitment to[6]

Clerk.

A True Copy. Certified this 13th day of November 1974

(Signed) Lewis Orgel (By) Michael J. [illegible]
Clerk. Deputy Clerk.

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